***THE HON'BLE Ms. JUSTICE G. ROHINI**

+ WRIT PETITION NO.13211 OF 2007
And
WRIT PETITION NO.13216 OF 2007

% 23/07/2007

M/s. Aditya Mecon Engineers (P) Limited,
4C, IV Floor, Fount Plaza, 30-15-190,
Dabagardens, Opp: Saraswathi Theatre,
Visakhapatnam, rep. By General Manager. …Petitioner

Vs.

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1. Visakhapatnam Port Trust, rep. By its
Board of Trustees, Port Area, Visakhapatnam.,
And another. .. Respondents

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> Head Note:

! Counsel for the petitioner : Sri D.V. Sitharama Murthy

^ Counsel for the respondents : Sri K.Srinivasa Murthy
Sri K.V.RAghuveer

Cases referred :

[1] AIR 1996 SC 11
2 1985 (2) Gujarat Law Reports 1208
3 2000 (2) SCC 617;
4 (2006)11 SCC 548
5 (1996) 4 SCC 529

THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION NO.13211 OF 2007
And
WRIT PETITION NO.13216 OF 2007

DATED: 23-07-2007

In WRIT PETITION NO.13211 OF 2007

Between :

M/s. Aditya Mecon Engineers (P) Limited,
4C, IV Floor, Fount Plaza, 30-15-190,
Dabagardens, Opp: Saraswathi Theatre,
Visakhapatnam, rep. By General Manager. …Petitioner

And

2. Visakhapatnam Port Trust, rep. By its
Board of Trustees, Port Area, Visakhapatnam.,
And another. .. Respondents

AND

In WRIT PETITION NO.13216 OF 2007

Between :

M/s. Aditya Mecon Engineers (P) Limited,
4C, IV Floor, Fount Plaza, 30-15-190,
Dabagardens, Opp: Saraswathi Theatre,
Visakhapatnam, rep. By General Manager. …Petitioner

And

1.Visakhapatnam Port Trust, rep. By its
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THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION NO.13211 OF 2007
And
WRIT PETITION NO.13216 OF 2007

COMMON ORDER :

The 1st respondent – Visakhapatnam Port Trust issued Tender Notice No.58/2006-2007 dated 23-1-2007 inviting sealed tenders from the contractors for the work of Annual Maintenance of 11 Nos. 10 Ton Capacity Electrical Level Luffing Cranes used for Cargo handling by the Port. The estimated cost of the work was Rs.1,54,44,000/-.

Similar Tender Notice No.57/2006-2007 dated 23-1-2007 was also issued by the 1st respondent inviting sealed tenders for the work of Annual Maintenance of 10 Nos. 15 Ton Capacity Cranes at the estimated cost of Rs.1,48,80,000/-.

The petitioner company which claims to have been engaged in various activities in relation to contracts of maintaining the electrical engineering heavy equipment and also claims to have successfully completed similar nature of work with the 1st respondent, had submitted its tender in response to both the Tender Notices. However, by separate letters dated 19-6-2007 the petitioner was

informed by the 1st respondent that it was technically disqualified for non-compliance of conditions of Notice Inviting Tender (NIT) and its price bid in sealed cover along with EMD was returned in respect of both the works. Consequently the works were proposed to be awarded to the 2nd respondent herein who was the only other participant, irrespective of the price quoted by it.

Aggrieved by the said action of the 1st respondent, these two writ petitions are filed. Since common questions of fact and law arise for consideration, both the writ petitions are heard together and decided by this common order.

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It is pleaded by the petitioner that the work of maintenance of the electrical wharf cranes and like equipment of the 1st respondent was being awarded to the 2nd respondent on nomination basis for the past many years till the year 2005. The petitioner claims that the said work was being sub-contracted to the petitioner by the 2nd respondent and consequently the petitioner was actually carrying out the work of maintenance for the past about 9 years prior to 2005 to the knowledge of the officials of the 1st respondent. That apart, for the year 2005 the 1st respondent had awarded the contract of the maintenance works through open tender to the petitioner and it has successfully completed the tenure of the contract. On the other hand, the 2nd respondent though had been awarded the contract earlier, it has never executed the job by itself, but has only sub-contracted the works on all the earlier occasions. Thus, while claiming that it is far superior to the 2nd respondent in terms of required experience, the petitioner contended that the impugned action of the 1st respondent in technically disqualifying the petitioner is unreasonable, arbitrary, irrational and is vitiated by extraneous considerations.

In the counter-affidavit filed on behalf of the 1st respondent, it is explained that only two firms have participated in the tender

including the petitioner and the 2nd respondent herein. The technical bids were evaluated by the Senior Tender Committee who had constituted a 3-Member Sub-Committee on 8-3-2007 for the purpose of enquiring into the claim of the petitioner regarding the tie-up with a manufacturing firm as a consort to carry out the job under the contract. The Sub- committee having made an enquiry submitted a report stating that the partner of the petitioner in consort namely M/s. Harichandana Engineering Works is not a manufacturing firm and it can only repair or fabricate small parts of ELL Cranes with an infrastructure available with them. It was also found that the said consort of the petitioner firm was not in a position to design any critical crane parts / mechanical accessories and thus the petitioner firm failed to satisfy the requirement of clause-3 of Qualification Criteria prescribed under NIT. Having considered all the aspects in detail, the Senior Tender Committee recommended to disqualify the petitioner firm on technical grounds as they have failed to establish that their associate namely M/s. Harichandana Engineering Works has design experience as required under Clause-3 of NIT. The Senior Tender Committee had also recommended to open the price bid of the only available party which was technically qualified in all respects including possession of the original manufacturing capacity and design capability to supply the accessories/components of the cranes. Accordingly, the same was informed to the petitioner by impugned letters dated 19-6-2007 duly returning the price bid along with the EMD.

I have heard the learned Counsel for both the parties and perused the material on record.

At the outset, it is relevant to note the pre-qualification criteria specified under the Notice Inviting Tender (NIT) in respect of the works in question as under :

"(Pre-qualification criteria)

1 (a) ***Bidder should either be a manufacturer of Bulk***

material handling equipment (system)/ELL Wharf (Quay) Cranes/Manufacturers of VVVF / Thyrister controlled drives or have successfully executed Annual Maintenance Contract of Electrical Wharf Cranes having VVVF / Thyrister control drives. *The bidder has to submit documentary proof in support of their claim duly furnishing the name of client, name of work, Contract No. and date, value of work etc.,*

(b) Bidder should enclose proof of satisfactory performance certificate from the previous clients in respect of works as mentioned in para 1 (a) above.

(c) The Bidder who is having consortium with the Manufacturers of the Electrical Luffing Cranes/ Bulk material handling equipments are also eligible subject to the fulfillment of experience and turn over criteria including other credentials either having individual credentials or Joint credentials.

2. Bidder / Consort should have direct tie-ups with the respective manufacturers of the Electronic drives fitted in the cranes (viz. SIEMENS/ ABB) during AMC period for ensuring back up support services, for which a valid supporting document from the manufacturers of the drives i.e. Siemens/ABB are to be enclosed at the time of submission of tender.

3. ***Bidder/Consort should have the Engineering and design capability to supply the mechanical accessories/components of the cranes, for which documentary evidence is to be produced along with the names, designation, qualifications, experience in the relevant field, etc., of the component staff and also proof of infrastructure facilities.***

… …. …. … …… ….”

It is also relevant to note the following tender schedule fixed in respect of the two tenders :

	Tender Notice No. 57/2006-07	Tender Notice No. 58/2006-07
Pre-Bid Meeting	*---- 15-02-2007*	*15-2-2007*
Last date of receipt of request for issue of tender papers	*---- 17-02-2007*	*19-2-2007*

Last date for issue of tender papers	----	*20-02-2007*	*21-2-2007*
Date and time for receipt of tender	----	*22-02-2007 upto 14 hours*	*23-2-2007 upto 14 hrs.*
Date and time of opening of tender	----	*22-02-20007 after 14.30 hours*	*23-2-2007 after 14.30 hrs*

The petitioner having obtained the Tender papers which included the conditions of contract in detail, participated in the pre-bid meeting held on 15-02-2007 and sought a clarification with regard to the words "Consort/Consortium" used in Clauses- 2 & 3 of Qualification Criteria.

The said point was clarified by the 1st respondent as under :

> *"The word "Consort/Consortium" means that the bidder should have tie-up arrangement with the manufacturing as stated in the tender to procure the required spares & services from an organization who is capable to deliver. All other conditions in the pre-qualification criteria will remain unaltered."*

Thereafter, the petitioner submitted its tender for both the works. Though it is not in dispute that the petitioner is not a manufacturer, the petitioner claimed that it has tie-up with one M/s. Harichandana Engineering, Visakhapatnam which is a manufacturer of the accessories and components of the cranes. It is also claimed that as a matter of fact, the petitioner has been utilizing the accessories and components of the cranes manufactured by its consort M/s. Harichandana Engineering since 1996 while sub-contracting the work on behalf of the 2nd respondent and also while independently executing the contract awarded to it in January, 2006 by the 1st respondent. Since as per the pre-qualification

criteria specified under NIT, a bidder could have a tie-up with consort which is a manufacturer, the petitioner contended that in view of its tie-up arrangement with M/s. Harichandana Engineering, whose past experience in supplying the accessories, matching the design and engineering requirements of the maintenance of cranes of the 1st respondent is borne out of the records of the 1st respondent, there cannot be any justifiable reason to disqualify the petitioner technically.

The 1st respondent did not dispute the fact that as per the pre-qualification criteria fixed under the NIT apart from the ***manufacturers*** of the bulk material handling equipment the ***bidders who are having consortium with the manufacturers of the electrical luffing cranes / bulk material handling equipments*** are also eligible to participate. However, it is contended that the petitioner's consort did not possess the engineering and design capability to supply the mechanical accessories/components of the cranes as required under Clauses-2 and 3 of the Qualification Criteria and therefore it was technically disqualified as recommended by the Senior Tender Committee.

In its additional Reply Affidavit, dated 12-7-2007, the petitioner while disputing the version of the 1st respondent, claimed that the Senior Tender Committee which met on 1-3-2007, had approved its technical bid on 2-3-2007 on the basis of the inspection of the workshop of M/s. Harichandana Engineering Works conducted on 8-2-2007. It is alleged that subsequently at the instance of the 2nd respondent – rival bidder, who made a complaint dated 5-3-2007 about the competence of the petitioner's consort, the issue was reopened and the decision of the Senior Tender Committee dated 2-3-2007 was reviewed purportedly on the basis of two interim reports of the sub- committee dated 10-3-2007 and 26-3-2007 resulting in the impugned action of disqualifying the petitioner technically. It is

contended that even the interim reports of the sub-committee were based on the inspection conducted on 8-2-2007 and no fresh inspection was conducted thereafter which itself shows that the impugned action is vitiated by extraneous considerations.

Having regard to the above pleadings, the learned Counsel for the petitioner vehemently contended that since apparently the decision making process of the 1st respondent did not satisfy the requirements of fairness and reasonableness and suffered from the vice of procedural impropriety, it warrants interference by this Court in exercise of power of judicial review under Article 226 of the Constitution of India. In support of his submissions, the learned Counsel has relied upon the decision of the Supreme Court in TATA CELLULAR vs. UNION OF INDIA[1] and a Division Bench Judgment of the Gujarat High Court in ASIA FOUNDATION AND CONSTRUCTIONS LIMITED vs. STATE[2].

It is true that as laid down by the Apex Court in TATA CELLULAR'S case (1 supra) in exercise of the power of Judicial Review the Court can examine the decision making process even in contractual matters in order to prevent arbitrariness or favouritism by the State and its Instrumentalities.

However in TATA CELLULAR'S case (1 supra) itself, it was made clear that there are inherent limitations in exercise of that power of judicial review. While holding that the right to refuse the lowest or any other tender is always available to the Government, it was further explained that there can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation and that the right to choose cannot be considered an arbitrary power except where such power is exercised for any collateral purpose. The principles laid down by the Apex Court in the said decision may be extracted hereunder :

"…1. The modem trend points to judicial restraint in

administrative action.

2. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

3. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

4. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5. The government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

Again in AIR INDIA LIMITED vs. COCHIN INTERNATIONAL AIRPORT LIMITED[3], the Supreme Court held as under:

"..The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need

not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms; standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

In a recent decision in B.S.N. JOSHI & SONS LTD. vs. NAIR COAL SERVICES LTD.[4] the Supreme Court while reiterating the principles governing the award of contract by the State and its Instrumentalities as laid down in a catena of earlier decisions observed that the application of the said legal principles would always depend upon facts and circumstances of each case.

In the light of the settled legal principles noted above, I shall now proceed to consider whether the decision making process in the instant case in technically disqualifying the petitioner is vitiated on the grounds of arbitrariness, unreasonableness or mala fides warranting interference by this Court.

Pursuant to the order of this Court, the learned Counsel for the 1st respondent has produced the entire record relating to the two

tenders in question. The record placed before this Court shows that the technical bids were opened on 22-2-2007 and 23-2-2007 as per the schedule. Only two bidders i.e., the petitioner and the 2nd respondent have participated and the technical bids in respect of Tender Notice No.57/2006-07 were evaluated by the Senior Tender Committee in its meeting held on 1-3-2007. Similarly the technical bids in respect of Tender Notice No.58/2006-07 were evaluated in the meeting held on 2-3-2007. The minutes of the said meetings shows that having scrutinized the technical bids, both the bidders were qualified and accordingly the committee recommended to open the price bids on 8-3-2007.

The record also shows that a letter from the 2nd respondent was received by the Chief Mechanical Engineer of the 1st respondent on 5-3-2007 in which it was alleged that the supporting engineers and manufacturers of the petitioner i.e., M/s. Harichandana Engineering Works did not have any experience in the relevant field and did not possess competent staff or necessary infrastructure for engineering and design of the components of the cranes. Pursuant thereto, the Chief Mechanical Engineer by proceedings dated 6-3-2007 constituted a committee consisting of 3 members to enquire into the representation made by the 2nd respondent and submit a detailed report before 10-3-2007. Accordingly, the said Committee met on 7-3-2007 and decided to make a visit to the work premises of M/s.Harichandana Engineering Works on 8-3-2007. The same was informed to M/s.Harichandana Engineering Works and the committee visited the work shop on 8-3-2007 and submitted an interim report dated 10-3-2007 as under :

> *"(1) When inquired about registration of workshop under the Industrial Act, the Committee was informed, it is not yet registered and it is under process.*
>
> *(2) There is no separate design and drawing facilities available in the workshop.*

(3) After examining the available machinery in the workshop it is assessed that certain machining and fabrication works can be carried out.

(4) However Sri P. Srinivasa Rao, during the telephonic conservation said that they have never taken up any works related with ELL Wharf Cranes till now.

(5) Keeping in view that the report has to be submitted by 10-3-2007 the committee asked the workshop to submit supporting documents of the works carried out by 9-3-2007 by 17-00 hrs. But the workshop has not submitted any documents till now."

The record also shows that on the basis of the information furnished by M/s.Harichandana Engineering Works subsequently claiming that they have designed, manufactured and supplied certain spares and parts to the 1st respondent on behalf of the petitioner and they are running satisfactorily, the sub-committee called for confirmation from DCME of the 1st respondent requesting to furnish the information on verification of the records. In response to the same, the DCME by letter dated 13-3-2007 informed that on verification of the available records/ledger/log books it was found that there was no recorded evidence to suggest that the supply of crane spares supplied by the petitioner during 2006 contract period were designed, manufactured and fabricated by M/s. Harichandana Engineering Works. The sub-committee informed the said fact to the petitioner and sought for clarification. In response, one Mr. Samuel, representing the petitioner company informed the sub-committee that they will have tie-up with Cescon, Kolkata if the tender bid comes in favour of the petitioner after the price bid is opened. Accordingly, a final report was submitted by the sub-committee on 26-3-2007 with the following findings :

"(1) M/s. Harichandana Engineering Works can repair or fabricate small parts/mechanical accessories of ELL cranes with the infrastructure available with them.

(2) M/s. Harichandana Engineering Works could not

produce any evidence to show that they can design any critical crane parts/mechanical accessories. M/s. Harichandana Engineering Works also could not produce any documents to show that they have a tie-up with M/s. CESCON, Kolkata."

The record further reveals that the Senior Tender Committee had also called for the Vigilance comments as to the past performance of the petitioner and from the said comments dated 3-5-2007 it was observed that the performance of the petitioner was not upto the mark and the breakdowns during the year 2006 were on higher side resulting in loss of number of working hours. Subsequently, the Senior Tender Committee met on 26-5-2007 and after considering all the aspects decided to obtain a legal opinion. Such legal opinion was received on 8-6-2007 stating that the poor performance of the petitioner cannot be ignored. Thereafter the senior tender committee met on 14-6-2007and recommended to disqualify the petitioner on technical grounds and consequently to open the price bid of the only other technically qualified firm i.e., the 2nd respondent.

Thus, it is clear from the record that the capabilities of the petitioner's consort were examined taking into consideration all the relevant facts and circumstances and the documentary evidence available. It is true that initially the Senior Tender Committee held that the petitioner was technically qualified and recommended to open its price bid. However, even before the price bid was opened, when the first respondent entertained a doubt as to the genuineness of the information furnished by the petitioner, a sub-committee was appointed to make necessary enquiries by inspecting the petitioner's consort. The first respondent was justified in making such enquiry so as to choose the best person for execution of the work tendered. Merely because the complaint was received from a rival bidder it cannot be presumed that the whole process was actuated by mala

fides particularly since the allegations were found to be true on subsequent enquiry. The contention of the petitioner that since on the basis of the inspection dated 8-2-2007 the petitioner's consort was found to be satisfying the required criteria, the 1st respondent cannot arrive at a different conclusion without conducting any further inspection is also without any substance. The record reveals that pre-bid meeting was held on 15-2-2007 and thereafter the petitioner submitted its tender. The sub-committee was appointed only on 6-3-2007 for verification of the competency of the petitioner's consort and the sub-committee inspected the workshop of M/s. Harichandana Engineering Works only on 8-3-2007. Thus, it is clear that there was no inspection on 8-2-2007 at all as pleaded by the petitioner. The sub-committee itself was appointed on 6-3-2007 and having visited the workshop on 8-3-2007 it submitted its interim report on 10-3-2007.

The record also reveals that one of the grounds on which the 1st respondent decided to disqualify the petitioner was that the performance of the petitioner was not upto the mark in the past. As observed by the Supreme Court in PATNA REGIONAL DEV. AUTHY. vs. RASHTRIYA PRAYOJANA NIRMAN NIGAM[5] the performance record of the tenderer while executing the previous contracts is also a relevant factor in deciding whether to award the contract in his favour or not. Such consideration cannot be said to be either arbitrary or unreasonable.

The learned Counsel for the petitioner however contended that Clause-3 of the qualification criteria contains an inherent inequality which is bound to affect a bidder who is not a manufacturer.

The law is well-settled that the terms of the invitation to tender is not open to judicial scrutiny because the invitation to tender is in the realm of contract. The Tender Inviting Authority has got the power to prescribe the qualifications and experience keeping in

view the nature of the work for which the tenders are invited. The same cannot be subjected to judicial scrutiny unless they are so arbitrary or irrational or ex facie in violation of Article 14 of the Constitution of India. Merely because one of the unqualified bidders feels that some other terms would have been fair or logical, the tender conditions cannot be held to be bad or discriminatory.

As noticed from the record placed before this Court, the technical bid of the petitioner was recommended for rejection by the Senior Tender Committee constituted by the 1st respondent, after making the necessary verifications as to the capabilities of the petitioner's consort. This Court cannot sit in appeal over the decision of the Tender Committee particularly in the absence of any material on record to infer mala fide design on the part of the 1st respondent to favour the 2nd respondent. Hence, the impugned action of the 1st respondent cannot be held to be arbitrary or illegal and the interference by this Court is not warranted on any ground whatsoever.

For the aforesaid reasons, both the Writ Petitions are devoid of any merit and the same are hereby dismissed. No costs.

G. ROHINI, J.

Dt. 23-07-2007
gbs
Note:- LR copy to be marked.

[1] AIR 1996 SC 11

[2] 1985 (2) Gujarat Law Reports 1208

[3] 2000 (2) SCC 617;

[4] (2006)11 SCC 548

[5] (1996) 4 SCC 529